RE WONG SOW FEE; EX P FEDERAL AUTO HOLDINGS BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-379-2007]
12 MARCH 2009

BANKRUPTCY: *Creditor's petition - Amendment - Application for - Whether allowed - Bankruptcy Act 1967, ss. 5(2), 93(3) - Bankruptcy Rules 1969, r. 274*

This was an appeal by the judgment creditor against the decision of the senior assistant registrar in dismissing the judgment creditor's application to amend the creditor's petition. The application was made pursuant to s. 93(3) of the Bankruptcy Act 1967 and r. 274 of the Bankruptcy Rules 1969. The judgment debtor objected to the application to amend the creditor's petition on the following grounds (i) the judgment creditor's application was filed only after the judgment debtor had filed an application to strike out the petition pursuant to O. 18 r. 19 of the Rules of the High Court 1980; (ii) the judgment creditor had failed to comply with s. 5(2) of the Bankruptcy Act 1967. The judgment creditor however submitted that this instant appeal was applying for an amendment of the creditor's petition on the ground of inadvertence in failing to include the amendment of s. 5(2) of the Bankruptcy Act 1967.

Held (allowing the appeal):

(1) The judgment creditor was seeking to amend the creditor's petition which it had filed before the hearing of the petition itself. It had the right to do so under s. 93(3) of the Bankruptcy Act 1967 and r. 274 of the Bankruptcy Rules 1969 afforded it the liberty to apply to amend its petition. The non-compliance was merely an irregularity which was curable under s. 5(2) Bankruptcy Act 1967. The objective of s. 5(2) is to commit the petitioner to elect right from the start whether he would give up his secured position as a creditor in order to facilitate the administration of the bankrupt's estate. It had nothing to do with the judgment debtor and should not therefore cause him any prejudice. The judgment creditor ought to be given leave to amend this petition.

Case(s) referred to:
Re Leong Lam Kai; ex p RHB Bank Bhd [2008] 1 LNS 602 HC ***(dist)***
Re a debtor (No 39 of 1974), ex parte Okill and another v. Gething and another [1977] 3 All ER Ch D 489 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5(2), 93(3)
Bankruptcy Rules 1969, r. 274
Rules of the High Court 1980, O. 18 r. 19

Bankruptcy Act 1914 [UK], s. 4(2)

For the judgment debtor - Pramjit Singh; M/s KK Lim & Assoc
For the judgment creditor - Douglas Yee; M/s Douglas Yee

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: (*ex-tempore*)

[1] This is an appeal by the judgment creditor against the decision of the senior assistant registrar in dismissing the judgment creditor's application to amend the creditor's petition. The application is made pursuant to s. 93(3) of the Bankruptcy Act 1967 which states:

> The court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose.

and also pursuant to r. 274 of the Bankruptcy Rules 1969 which states:

> **274. Effect of non-compliance with Rules**
>
> Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

Mr. Pramjit Singh For The Judgment Debtor

[2] We object to the application to amend the creditor's petition on the following grounds:

i. The judgment creditor's application was filed only after the judgment debtor has filed an application to strike out the petition pursuant to O. 18 r. 19 of the Rules of the High Court 1980.

ii. In the petition the judgment creditor failed to comply with s. 5(2) of the Bankruptcy Act 1967 which read as follows:

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

iii. Non-compliance of this provision is fatal. See *Re Leong Lam Kai; Ex p RHB Bank Bhd* [2009] 2 CLJ 662 where the court allowed the judgment debtor's application to set aside the creditor's petition on the ground of non-compliance with s. 5(2).

[3] Mr. Douglas Yee For The Judgment Creditor

i. As far as the case of *Leong Lam Kai* is concerned, there was no application to amend the creditor's petition and that case related to the setting aside of the creditor's petition. This instant appeal is not concerned with setting aside of the creditor's petition. Only amendment of the creditor's petition on the ground of inadvertence in failing to include the amendment of s. 5(2) of the Bankruptcy Act 1967. The amendment we seek is to state clearly that we are not a secured creditor and we are willing to give up any such security if any. See *Re a debtor (No 39 of 1974), ex parte Okill and another v. Gething and another* [1977] 3 All ER Ch. D 489 which is on all fours with our case. It was held per Goulding J at p. 495:

> In our judgment, no injustice is done by allowing amendment irrespective of the value of the security in a case such as the present, where in petition and in proof the creditor has wholly ignored his security, and he then seeks an amendment that surrenders it.

ii. The fact that we filed our application only after the judgment debtor's application to strike out the application was also considered by Goulding J wherein at p. 496, he said:

> The petitioning creditors having prepared their petition on advice, and the facts being available to the debtor, they had no reason to amend unless or until they knew that a different view of the law was maintained on his behalf.

iii. Hence in the *Okill* case the application to amend the creditor's petition to include the election provision of the Bankruptcy Act (in our case the s. 5(2)) was allowed.

[4] Reply By Mr. Pramjit Singh

i. In the *Okill* case the application to set aside was made two years after adjudication and receiving order was made.

Decision

[5] I would agree entirely with the submission of counsel for the judgment creditor that the *Leong Lam Kai* case should be distinguished from the instant case.

[6] In the instant case, the judgment creditor is seeking to amend the creditor's petition which it had filed before the hearing of the petition itself. It has the right to do so under s. 93(3) of the Bankruptcy Act 1967 and r. 274 of the Bankruptcy Rules 1969 affords it the liberty to apply to amend its petition.

[7] I am also entirely with Goulding J that the non-compliance was a mere irregularity which is curable under s. 4(2) of the English Bankruptcy Act 1914 which is in *pari materia* with our s. 5(2) Bankruptcy Act 1967 and the reasons given by him for allowing the amendment.

[8] To decide whether an application to amend a creditor's petition should be allowed, it would be appropriate to apply the same test in *Yamaha Motors* as it applies in an application to amend a pleading in a writ action – the primary consideration

being whether the amendment would cause any prejudice to the judgment debtor. The objective of s. 5(2), it is to be appreciated, is to commit the petitioner to elect right from the start whether he would give up his secured position as a creditor in order to facilitate the administration of the bankrupt's estate. It has nothing to do with the judgment debtor and should not therefore cause him any prejudice.

[9] The judgment creditor ought to be given leave to amend this petition.

[10] The appeal is allowed with costs.